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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1053

EDWARD KRECHEVSKY, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner Edward Krechevsky prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on December 14, 1967 and modified by a Stay of Mandate entered on January 3, 1968.

CITATION TO THE OPINION BELOW

No written opinion of the United States Court of Appeals for the Second Circuit was filed in this case.

JURISDISTION

The judgment of the United States Circuit Court of Appeals was entered on December 14, 1967 and modified by a Stay of Mandate on January 3, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. When an accused is arrested under a warrant issued pursuant to a complaint and is presented before a U.S. Commissioner and the preliminary hearing is continued, does the return of an indictment against the Defendant on the same charge prior to the holding of the preliminary hearing dispense with the necessity of such preliminary hearing under Rule No. 5 of the Federal Rules of Criminal Procedure?

2. Was the evidence offered by the United States sufficient to establish that the threats attributed to the Defendant were for informing or not informing against *any violation of any law of the United States.*

CONSTITUTIONAL PROVISIONS INVOLVED

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense. U.S. Const. Amend VI.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor be deprived of life, liberty or property, without due process of law . . . U.S. Const. Amend. V.

STATUTES INVOLVED

Title 18, Section 873. Blackmail

Whoever, under a threat of informing, or as a consideration for not informing, against any violation of any law of

the United States, demands or receives any money or other valuable thing, shall be fined not more than $2,000 or imprisoned not more than one year, or both.

RULE 5. PROCEEDINGS BEFORE THE COMMISSIONER

(a) APPEARANCE BEFORE THE COMMISSIONER. An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith.

(b) STATEMENT BY THE COMMISSIONER. The commissioner shall inform the defendant of the complaint against him and of any affidavit filed therewith, of his right to retain counsel, of his right to request the assignment of counsel if he is unable to obtain counsel, and of his right to have a preliminary examination. He shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The commissioner shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided in these rules.

(c) PRELIMINARY EXAMINATION. The defendant shall not be called upon to plead. If the defendant waives preliminary examination, the commissioner shall forthwith hold him to answer in the district court. If the defendant does not waive examination, the commissioner shall hear the evidence within a reasonable time. The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. If from the evidence it appears to

the commissioner that there is probable cause to believe that an offense has been committed and that the defendant has committed it, the commissioner shall forthwith hold him to answer in the district court; otherwise the commissioner shall discharge him. The commissioner shall admit the defendant to bail as provided in these rules. After concluding the proceeding the commissioner shall transmit forthwith to the clerk of the district court all papers in the proceeding and any bail taken by him. (As amended Feb. 28, 1966, eff. July 1, 1966.)

STATEMENT OF THE CASE

On January 11, 1967, Assistant United States Attorney David Margolis appeared before the Honorable M. Joseph Blumenfeld and obtained a warrant for the arrest of Edward Krechevsky for a violation of Title 18, United States Code, Section 873, upon a sworn complaint.

On January 11, 1967, special agents of the Federal Bureau of Investigation arrested Edward Krechevsky pursuant to the aforesaid warrant and presented him before the United States Commissioner Thomas F. Parker. At the conclusion of this presentment, the proceedings before the Commissioner were continued to an indefinite date.

During the adjournment of said proceedings before the United States Commissioner, the United States Attorney for the District of Connecticut sought an indictment against the Defendant for a violation of Title 18, United States Code, Section 873.

On February 6, 1967, a grand jury sitting in New Haven, Connecticut returned a true bill of indictment charging the Defendant with a violation of Title 18, United States Code, Section 873.

On February 17, 1967, the Defendant appeared before the Honorable Thomas F. Parker, United States Commissioner, at a reconvened presentment but was refused a preliminary hearing before said Commissioner (R 1).*

On March 2, 1967, the Defendant filed a Motion to Dismiss the Indictment which motion was heard on March 6. 1967 and said motion was denied by the Court on March 9, 1967 (R 1).

On April 3, 1967, the Defendant entered a plea of not guilty (R 2).

On May 23, 1967, trial commenced before the Honorable M. Joseph Blumenfeld, United States District Court Judge and a jury of twelve. When the Government rested its case, the Appellant moved for acquittal which motion was denied and the Appellant then offered evidence and rested his case (R 2).

On May 23, 1967, the jury found the Appellant guilty as charged in the indictment. The verdict was verified and ordered recorded (R 1).

On June 5, 1967, the Defendant's Motion for a New Trial and his Motion in Arrest of Judgment were both denied (R 2).

On June 5, 1967, the Defendant was sentenced to one year imprisonment, execution of this sentence was to be suspended after sixty days and the Defendant was placed on probation for three years (R 2).

On June 13, 1967, the Appellant filed a Notice of Appeal to this Honorable Court (R 2). (Second Circuit Court of Appeals)

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* References marked R. are to the pages of the record on appeal.

STATEMENT OF FACTS

Prior to December of 1966, one Roy Galley, Thomas Devine and Edward Bartenstein participated in a plan to defraud the Security Insurance Company by issuing fraudulent checks (TR 6). As a result of this scheme, the Security Insurance Company was defrauded of approximately $170,000 (TR 8). On Thursday, December 29, 1966, Mr. Roy Galley was at the place of business of Mr. Edward Bartenstein which was known as A & B Motors, Inc., 521 Wethersfield Avenue, Hartford, Connecticut. Also present was Mr. Edward Krechevsky, the Defendant in this case (TR 12). At this meeting which occurred at approximately 5 p.m. in the evening, Mr. Bartenstein stated that he needed $20,000, $10,000 for himself and $10,000 for Mr. Roy Galley for attorney's fees and for bail bonds. Mr. Bartenstein asked Mr. Krechevsky if he would do him a favor by going to see one Thomas Devine to obtain the money as a favor (TR 13-14).

At approximately 8 p.m. on Thursday, December 29, 1966, the Defendant appeared at the home of Thomas Devine in West Hartford, Connecticut and had a conversation with Mr. Devine on his front porch (TR 21-22). The Defendant informed Mr. Devine that he was a friend of Roy Galley and Edward Bartenstein. The Defendant then stated the following to Mr. Devine: "You know Bartenstein has been arrested" and Devine stated that he was aware of this fact. Krechevsky then stated, "He wants $20,000 from you and unless you give it to him, you are going to be brought into this". Mr. Devine replied to Mr. Krechevsky as follows: "I am probably in it already. I talked to the F.B.I. earlier in the week". To that the Defendant responded, "They don't know anything about you. They know about Bartenstein and Galley, they don't know anything about you but unless you give us $20,000 they are going to bring you into this, he is going to bring you into it." Devine replied that he was not going to furnish the

$20,000 to which Mr. Krechevsky said, "Well, they are going to bring you into it, they have a cancelled check that Roy Galley gave you for $3,000 that you endorsed" (TR 24-25). Mr. Devine reiterated that he was not going to furnish any money. The Defendant then told Mr. Devine that he would like to call him at the Maxwell Drug Store in West Hartford Center at 11 o'clock on the following morning which was Friday, December 30, 1966. The following morning Mr. Devine was at the Maxwell Drug Store and answered a phone at the public phone booth and spoke to Mr. Krechevsky. Mr. Krechevsky again asked him if he was going to furnish the $20,000 and Mr. Devine again stated that he would refuse to furnish that sum (TR 27). Mr. Devine also stated that, "I have drafts with signatures of Galley and Bartenstein on the drafts and, I'm not causing trouble for anybody, why was he?" The Defendant replied that, "That isn't going to make any difference, you are going to be in this thing if you don't come up with the $20,000". Devine again replied that he would not and the Defendant said, "OK, you are in it" and hung up (TR 28).

The record does not indicate any further discussions between the Defendant and Mr. Devine. The Defendant was arrested by Federal Agents on January 11, 1967.

REASONS FOR GRANTING THE WRIT

1. The decision below is in direct conflict with the decision of the Court of Appeals for the District of Columbia Circuit which ruled on the function of a preliminary hearing and the right of an accused arrested under a complaint to have a preliminary hearing before a commissioner prior to trial. The judgment in this case violates the fundamental right of the accused in a proceeding initiated by a complaint to have the nature and cause of the accusation against him heard. The decision below is in direct conflict with the decisions of the United States Court of Appeals for the District of Columbia Circuit as rendered in *Ross, Jr.*

v. *Honorable John Sirica,* 380 F2d 557. The *Ross* case reaffirms the earlier rule set forth in *Blue* v. *The United States,* 342 F2d 894 Cert. denied 380 U.S. 944 (1965) which held that when criminal proceedings were commenced by a complaint the accused is entitled to a preliminary hearing before the commissioner and an intervening indictment cannot vitiate this right. The opinion in this case reaffirms the Second Circuit Court's position set forth in *United States* v. *Heap,* 345 F2d 170 (1965) that a preliminary hearing becomes unnecessary when an indictment in the case is returned. It appears that the factual circumstances in the instant case afford this Honorable Court an opportunity to resolve the present conflict between the two Circuits on this point of controversy. The Defendant in this case was presented before a commissioner on the date of his arrest pursuant to a complaint. The hearing before the commissioner was continued and counsel for the Defendant never waived the hearing but requested that a hearing before the commissioner be convened. Before the hearing was finally convened on February 16, 1967, the prosecution obtained an indictment from a grand jury dated February 6, 1967. The commissioner thereupon refused to proceed further with the preliminary hearing and the Trial Court denied the Defendant's Motion to Dismiss the Indictment because of the failure to hold the preliminary hearing. The reason for the refusal to dismiss the indictment and the apparent reason for the affirmance of the trial court's decision by the Second Circuit Court of Appeals is that when an indictment is returned between the date of the complaint and the arrest and the date of the preliminary hearing extinguishes the Defendant's right to such a preliminary hearing. It appears that this question will continue to be a cause for dispute until finally set at rest by this Honorable Court. The Government has acknowledged the fact that there is a question that should be resolved between the Circuit Court by petitioning for certiorari in *Blue* v. *United States,* Supra, (cert. denied)

and the petition for a hearing en banc in *Ross* v. *Sirica,* Supra, which was denied on March 24, 1967. Recently another case was decided by the Second Circuit Court of Appeals which presented this issue; namely, *Sciortino* v. *The Honorable Robert C. Zampano,* Second Circuit Court of Appeals Docket No. 31677.

2. The Defendant in the Second Circuit Court raised the issue as to whether the evidence offered by the prosecution in this case was sufficient to establish that the threats attributable to the Defendant were for informing or not informing against "any violation of any law of the United States". The question raised herein has never been specifically resolved by any Federal Court. The threats attributed by the prosecution to the Defendant did not specifically refer to any Federal violation and does not appear that the Defendant even knew of a specific Federal violation. The decision of the Trial Court on the Defendant's Motion for Acquittal and the decision of the Second Circuit Court apparently was made on this point on the premise that knowledge of the Defendant of a Federal violation is not essential and if a Federal violation is in any way involved in the subject matter of the alleged threat, even though not part of the alleged threat as uttered, then the element of a violation showing that the threat was one against "any violation of any law of the United States" is satisfied if the Government is able to show that the subject matter alluded to by the Defendant in his threat involves (even if only incidentally) some violation of Federal law. The issue raised in this case is one that goes to the heart of the jurisdiction to prosecute under Title 18, Section 873. The determination of this question would appear to be essential in order to enable State and Federal authorities to determine the extent of their jurisdiction of the crime of extortion. An opportunity is afforded this Court to definitively

establish the extent of Federal jurisdiction in matters of extortion.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the District of Connecticut, petitioner was convicted of blackmail, in violation of 18 U.S.C. 873. He was sentenced to one year's imprisonment, with execution to be suspended after 60 days, and probation thereafter for three years. The court of appeals affirmed without opinion on December 14, 1967. The petition for a writ of certiorari was filed on January 26, 1968, and is therefore out of time under the Rules of this Court. In all events, there is no occasion for further review.

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1. The evidence showed that one Bartenstein had been arrested by for mail fraud committed in the course of a scheme by which an insurance company was defrauded of $170,000 (R. 8). After his arrest, Bartenstein asked petitioner to contact Thomas Devine, one of Bartenstein's accomplices in the scheme, and obtain $20,000 from him for attorney fees and bail bonds (R. 13). Shortly thereafter, petitioner went to Devine's home, represented himself as a friend of the other participants, and asked Devine for the $20,000, saying that otherwise Devine would be brought into the case (R. 24). When Devine said that he was "probably in it already" since he had talked to the F.B.I. earlier in the week, petitioner replied, "They don't know anything about you * * *" (R. 24). Petitioner added that Bartenstein had a cancelled check endorsed by Devine, which represented a partial payment of Devine's share of the proceeds of the fraud (R. 25). By arrangement, petitioner called Devine at a public telephone booth the next day and told him, "You are going to be in this thing if you don't come up with the $20,000" (R. 28). When Devine repeated his refusal, petitioner replied, "O.K., you're in it" (R. 28). In the presence of his lawyer, petitioner confessed the above facts to an assistant United States Attorney (R. 90, 92).

2. Petitioner contends that the evidence does not show that his demand for money was made under a threat of informing "against any violation of any law of the United States" within the purview of 18 U.S.C. 873. Devine's reference to the F.B.I. interview and petitioner's reply, however, clearly showed that petitioner was aware that Bartenstein had been arrested for a federal offense. Furthermore, the trial judge instructed the jury that "the Government must prove then that a demand was made upon Thomas Devine of a sum of money in exchange for not informing on Devine's violation of Federal laws" (R. 177).

3. After his arrest on January 11, 1967, petitioner was brought before a United States Commissioner, and the proceeding was adjourned to February 16. Petitioner was indicted on February 6, 1967. As a result, the commissioner refused to proceed with the preliminary hearing. The district court denied petitioner's pretrial motion to dismiss the indictment because a preliminary hearing had not been held.

This ruling was clearly correct, since an indictment is not subject to dismissal because of the absence of a preliminary hearing. *Blue* v. *United States,* 342 F. 2d 894 (C.A.D.C.), certiorari denied, 380 U.S. 944. Even if petitioner had sought to compel a preliminary hearing after the indictment had been returned, his motion would properly have been denied. See Memorandum for the United States in Opposition, *Sciortino*

v. *Zampano,* No. 902, this Term, certiorari denied January 22, 1968.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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